INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 33

ORLANDO DELLI PAOLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of Judge Hand for the Court of Appeals, the concurring opinion of Judge Medina, and the dissenting opinion of Judge Frank (R. 1026–1040) are reported at 229 F. 2d 319.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1956 (R. 1041). The petition for a writ of certiorari was filed on February 3, 1956, and was granted on March 26, 1956, 350 U. S. 992. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for conspiracy to deal unlawfully in alcohol.

2. Whether, in a joint trial, the trial judge abused his discretion in refusing petitioner's demand for exclusion from evidence of a co-defendant's post-conspiracy confession, and in admitting the confession solely against the co-defendant, with extensive admonitions that the confession be considered only in determining the guilt of that co-defendant and not in determining the guilt of any other defendants.

STATUTES AND RULES INVOLVED

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * * *.

The Internal Revenue Code of 1939 (26 U. S. C., 1952 ed.) provided:

> SEC. 2803. *Stamps for containers of distilled spirits—(a) Requirement.*
>
> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *

SEC. 2806. *Penalties and forfeitures*— * * *

* * * * *

(e) *Evasion of tax, penalty.*

Whenever any person evades, or attempts to evade, the payment of the tax on any distilled spirits, in any manner whatever, he shall forfeit and pay double the amount of the tax so evaded or attempted to be evaded.

SEC. 2913. *Penalty for unlawful removal or concealment of spirits.*

Whenever any person removes, or aids or abets in the removal of, any distilled spirits on which the tax has not been paid, to a place other than the internal revenue bonded warehouse provided by law, or conceals or aids in the concealment of any spirits so removed, or removes, or aids or abets in the removal of, any distilled spirits from any such warehouse authorized by law, in any manner other than is provided by law, or conceals or aids in the concealment of any spirits so removed, he shall be liable to a penalty of double the tax imposed on such distilled spirits so removed or concealed, and shall be fined not less than $200 nor more than $5,000, and imprisoned not less than three months nor more than three years.

The Federal Rules of Criminal Procedure provide:

Rule 8. *Joinder of offenses and of defendants.*

* * * * *

(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constitu-

ting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 12. *Pleadings and motions before trial; defenses and objections.*

* * * * *

(b) *The Motion Raising Defenses and Objections.*

* * * * *

(2) *Defenses and Objections Which Must be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. * * *

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Rule 14. *Relief from Prejudicial Joinder.* If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT

Petitioner and four co-defendants were convicted of conspiracy to possess and transport alcohol in unstamped containers and to evade payment of taxes on the alcohol, in violation of 18 U. S. C. 371, and the Internal Revenue Code of 1939, Sections 2803 (a), 2806 (e), and 2913 (R. 908–909, 942, 970–972).[1] Petitioner was sentenced to imprisonment for a period of two years (R. 965, 1002).[2]

At the trial, the government first presented the testimony of federal agents and neighbors who had directly observed the activities of the defendants. Upon the conclusion of this body of testimony, the trial judge admitted in evidence, solely as against the co-defendant Whitley, a written statement of Whitley executed by him after the termination of the conspiracy. (The admonitions and instructions to the jury with respect to this statement are set forth *infra,* pp. 12–17, 32–35.)

1. The eye-witness and documentary evidence

The testimony of the agents and neighbors, independent of and prior to the Whitley statement, may be summarized as follows:

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[1] Two of the co-defendants were also convicted of substantive offenses under the remaining two counts of the indictment charging, respectively, possession of 19 five-gallon cans and 113 five-gallon cans of unstamped alcohol (R. 905–906, 942).

[2] The sentence followed a pre-sentence showing of a prior violation of the laws relating to distilled spirits, petitioner having been sentenced to 90 days for transportation of alcohol in 1946. He had also been sentenced to 30 days for assault and battery in 1936 (R. 945–946).

In December 1949, co-defendant Pierro approached one Krone, who owned a cottage and garage at 1124 Harding Park, in the Bronx, New York City, and discussed the purchase of Krone's property (R. 78–79). Krone had let it be known at the Tivoli Bar, of which petitioner and co-defendants Pierro and Margiasso were also patrons (R. 76, 123–124), that he wished to sell this property (R. 78, 105, 119). After Pierro's approach, there were three or four conversations (R. 80) at which petitioner and Margiasso were generally present although not participating directly (R. 81, 108). Petitioner was known to Krone only under the alias "Bobbie London" (R. 73, 73).[3]

On December 7, 1949, a federal agent of the Alcohol and Tobacco Tax Division observed Pierro driving to petitioner's residence at 1155 Croes Avenue, where Pierro picked up petitioner and then drove to the Harding Park address. There the two walked around the garage structure, inspecting it from the outside and back, for about half an hour to an hour (R. 23–24, 32, 45, 56–57). On December 29, 1949, Krone met with Pierro and a lawyer at the Tivoli Bar to consummate the sale. Title was taken in the name of Pierro's sister, who had nothing to do with any of the negotiations and had never inspected the premises. She appeared in the transaction only upon this occasion and at the closing. She had possession of $2,000 which she handed to Pierro, who handed it to the

[3] A second series of pages 72 and 73 follows the first pages 72 and 73. The instant testimony appears, in different form, on both of the pages numbered 73.

lawyer, who in turn counted and delivered it to Krone (R. 89, 91–92, 112–113, 115).

On April 10, 1950, Pierro was observed driving to petitioner's residence, from which petitioner and Pierro drove to a parking lot and inspected a green Diamond T panel truck (R. 32–33). Two days later, on April 12, the truck was observed parked at the Harding Park garage (R. 33). The truck was registered under a false name (R. 133, 207–208, 419).

On April 12, 1950, Pierro and another man (not recognized by the federal agent) were observed working inside the garage, hammering and sawing (R. 33, 35, 48). Prior to the sale by Krone, the doors to the garage had had glass windows, but thereafter, by the spring of 1950, these were boarded up. This and a narrowing of the door opening were the only changes made in the garage. No work by Pierro on the house itself was observed, the only work being done in the garage (R. 48–49, 94–95, 97, 99, 557–559, 566–567, 573).

For some months after Krone moved out, the cottage was occupied by a new tenant or tenants, with whom the neighbors were unacquainted. Thereafter, it was occupied by Mr. and Mrs. Di Pasquale and three children. The Di Pasquales had no car (R. 536–537, 546–547, 552, 558–559).

On May 1, 1950, Pierro picked up petitioner at the latter's home and drove him to the Harding Park garage. Petitioner took the Diamond T truck, which was parked there, to a filling station for gasoline, and then drove it to a lot opposite petitioner's residence, where he parked it (R. 34–35, 42–44). During 1950

and 1951, the truck was parked for weeks at a time alongside the Harding Park garage. The neighbors never observed the truck being used during the day, but one neighbor, working nights, on a number of occasions in the autumn of 1951 saw that the truck was missing at about 2 a. m., but always back alongside the garage in the morning (R. 543–545, 554, 561–563, 575).

Petitioner was seen on the Harding Park premises by a neighbor in midsummer 1951 and was introduced by Mrs. Di Pasquale as her cousin (R. 540, 542, 548, 552). Another neighbor also saw petitioner once or twice on the premises (R. 564–565, 575). Pierro was seen at the premises five or six times (R. 541–542).

On December 3, 4, and 6, 1951, the Diamond T truck was observed parked opposite petitioner's residence (R. 143–144, 247, 262–264, 267, 273–274). On December 4, petitioner was observed by federal agents leaving his home in his car. He drove to the Harding Park garage, backed his car to the door of the garage, and opened the doors, at which point the federal agents had to move away (R. 144, 275, 277, 444–445).

On December 6, 1951, federal agents followed petitioner to a gas station on Bruckner Boulevard (in the Bronx), where he busied himself about a green Dodge panel truck, bearing no license plates (R. 626–627). On December 10, 1951, the Dodge truck was observed parked next to the Diamond T truck, across from petitioner's residence, still without license plates (R. 146–147, 280–281). On that day, petitioner and Margiasso took from the Dodge truck several bundles of

flat cartons suitable for enclosing 5-gallon cans, placed the cartons in the Diamond T truck, drove to the Harding Park garage, unloaded a wooden portable fireplace and tables in the garage, and drove the truck back to its parking place opposite petitioner's residence (R. 147, 281–286, 445–446, 472–474, 581–588, 647–648). Later on that day, Margiasso returned and drove the Diamond T truck away (R. 148).

At a later time, prior to December 12, 1951, the Dodge truck was painted black in a lot opposite petitioner's residence. License plates registered under a false name (R. 134–135, 208, 419) had also been supplied by December 12, 1951 (R. 148, 258, 289, 471).

On December 18, 1951, petitioner's car was observed parked at the Bruckner Boulevard gas station at about 5:00 p. m. About half an hour later petitioner drove to his residence in it (R. 590–591). At about 6:30 p. m., Margiasso came to the Harding Park garage and went in (R. 149–150, 396–397). Between 8 and 9 p. m., Margiasso appeared at the gas station and entered the office, followed by petitioner a few minutes later (R. 150, 397–398, 591). A little thereafter, two men came to the gas station in a Pontiac car and entered the office (R. 150, 154, 399–400). Margiasso drove off in the Pontiac and returned in about 20 minutes or half an hour, the Pontiac's rear end down, appearing heavily loaded (R. 151, 154, 372–373, 400–401, 593). The Pontiac was then driven away by the two men who had brought it, but the federal agents trailing the car lost sight of it (R. 154, 373, 400, 591–592). The agents had noted the license number, how-

ever, and the car was found to be registered under a false name (R. 137, 150, 206–207).

Petitioner left the gas station after the two men left with the Pontiac. He went first to the Tivoli Bar for 15 minutes and then to another bar, the Lido Bar, where a man removed a large package wrapped in brown paper from petitioner's car and carried it into the bar (R. 595–596, 632–634).

On December 19, 1951, petitioner conferred with Margiasso and another man for about an hour at a real estate office, then emerged with Margiasso and handed him a large white cloth bag from petitioner's car. Margiasso drove to the Harding Park garage and backed the car up to the door, at which point the federal agents who were watching left for another place (R. 671–674).

On December 20, 1951, petitioner's car was again seen parked at the Bruckner Boulevard gas station (R. 255–256). On December 28, 1951, at about 7 p. m., petitioner and Margiasso were observed together in the office of the gas station. Petitioner left shortly thereafter. Co-defendant King drove up in a Plymouth coupe and talked with Margiasso, who then drove away in King's Plymouth. A short while later, petitioner drove back into the gas station, where he and King sat in Margiasso's car. Petitioner went into the office with King, remaining there while an attendant brought petitioner's car into the station's greasing pit and later returned it to the sidewalk. Petitioner and King then sat in petitioner's car until Margiasso's return (R. 159–161, 292–295, 351–355, 401–404, 504–507, 599–601, 603, 652–654, 658–660).

Meanwhile, federal agents observed Margiasso at the Harding Park garage, where the garage doors and the trunk compartment of the Plymouth were open and there was the sound of activity within the garage (R. 601–603). Upon Margiasso's return to the gas station with the Plymouth, King drove it away, the rear end of the car low, as from a heavy load. Federal agents followed King, arrested him, and seized 19 five-gallon cans of unstamped alcohol in the car (R. 161–164, 298, 362, 405–408, 510, 515, 520, 602–606, 660–661, 663–664).

At about 10:00 p. m. on the same evening of December 28, 1951, petitioner and Margiasso were again seen together at the gas station, and petitioner again left after a short time (R. 607, 654). Five minutes later, two men, one of whom was co-defendant Whitley, drove up in the Pontiac car which had eluded the federal agents on the evening of December 18 (R. 168, 305–306, 409–410, 431, 608). Margiasso drove away in the Pontiac, leaving the two men at the gas station. Federal agents followed, and at the Harding Park garage saw the doors open and the Pontiac backed up to the opening. As the agents drove by, Margiasso turned on his lights and drove away from the garage. Margiasso was arrested about a block from the garage after he had driven away from it, and surrendered his keys to one of the agents (R. 168–170, 308, 311–315, 410–411, 431, 448–456, 458–459, 490, 608–611, 648–651). Margiasso stated to the agents that a man whose name he did not know and whom he had met in a diner had given him $5 to drive

the car to that point and leave it in the street (R. 170, 308, 411, 454, 459, 489–490, 611, 650).

At the garage, 113 five-gallon cans of unstamped alcohol were discovered (R. 171, 375, 417, 611–612). One of Margiasso's keys fitted the padlock on the garage door (R. 172, 612) and another fitted the ignition of the Diamond T truck parked opposite petitioner's residence (R. 190–191, 417–419).

At the gas station, Whitley was arrested, and about $1,000 was found in a paper bag he was carrying. At about this time petitioner drove into the gas station. When a federal agent went over to petitioner and began speaking to him, petitioner backed his car away toward the street. The agent ran alongside until another agent drove a car to a position blocking petitioner, and a police car blocked the other side. Petitioner was then placed under arrest (R. 179–181, 306–307, 329, 367, 413–416, 437–441).

2. The Whitley confession

The government offered in evidence a written confession of co-defendant Whitley, signed on January 5, 1952, which is reproduced at pp. 30–33 of petitioner's brief. The trial judge deferred consideration of the admissibility of the confession until completion of all the direct testimony summarized above. Then he informed the jury that the confession to be presented was to be admitted only as against Whitley, stating (R. 727–735):

On the basis of my examination of the law I am going to admit the exhibit as against the defendant Whitley only. * * *

In order that this limited purpose may be clear to you, the members of the jury, I will at this time first review the several counts of the indictment. [Extensive review and quotation of the indictment.]

* * * * * *

The proof of the Government has now been completed except for the testimony of the witness Greenberg as to the alleged statement or affidavit of the defendant Whitley. This affidavit or admission will be considered by you solely in connection with your determination of the guilt or innocence of the defendant Whitley. It is not to be considered as proof in connection with the guilt or innocence of any of the other defendants.

The reason for this distinction is this: An admission by defendant after his arrest of participation in alleged crime may be considered as evidence by the jury against him, together with other evidence, because it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such defendant after his arrest implicates other defendants in such an admission it is not evidence against those defendants because as to them it is nothing more than hearsay evidence.

Now, when you go out to consider your verdict when all the evidence is in, you must ren-

der a verdict as to the defendants other than Whitley on the basis of the evidence which you have heard and which you may hereafter hear without giving any weight as to those defendants to this statement or affidavit which I am admitting into evidence.

* * * * *

Since the Government's case is concluded except for this statement or affidavit and the testimony of this witness Greenberg, it will be easier for you to keep in mind the testimony which you have heard up to now concerning the other defendants.

Whitley's confession had been prepared and signed at the office of the Alcohol and Tobacco Tax Division in the presence of Whitley's attorney. It recited the following, *inter alia:* Commencing around Thanksgiving 1949, Whitley had purchased alcohol from one "Tony", from another man who was not identified, and thereafter from one "Carl". Shortly before "Carl" went to jail in 1950, he introduced Whitley to petitioner, known to Whitley as "Bobby". Petitioner would see Whitley at Whitley's house and a date, time, and place would be set. Whitley's car would be taken from the designated place and then returned with the alcohol. Commencing in early November, 1951, the place had been the gas station on Bruckner Boulevard. Early in December, petitioner introduced Whitley to Margiasso as the man who would take the car and return with the alcohol, petitioner warning Whitley that payment was always to be made to petitioner. It was pursuant to one such

arrangement that Whitley was at the gas station on December 28, 1951, and was arrested (Pet. Br. 30–33).

After the reading of the confession, while defense counsel was cross-examining the federal agent who had identified the confession, the jury was again warned, on occasions when there were references to remarks by Whitley to the agent, that such remarks could constitute evidence only against Whitley and not against petitioner or the other defendants (R. 749, 753–754, 757–758, 792, 823–824, 826–828, 864–865; see pp. 34–35, *infra*).

The defendants did not take the witness stand and, with one brief and abortive exception, presented no testimony in their behalf (R. 875).[4]

The judge's final instructions to the jury included the following:

> The existence of the conspiracy and each defendant's connection with it must be established by individual proof based upon reasonable inference to be drawn from such defendant's own actions, his own conduct, his own declarations, and his own connection with the actions and conduct of the other alleged co-conspirators.
>
> However, once you have decided, if you decide, that a conspiracy existed and that a defendant on trial was a member of the conspiracy, using the test I have described, then the acts and declarations of any one of the

[4] One of the neighbors at Harding Park, originally called as a government witness, was recalled by petitioner as a defense witness, but was excused when she denied that petitioner was accompanied by a woman when he was at the Harding Park premises (R. 576–577).

other persons whom you find were also conspirators, during the pendency of the conspiracy, and before the arrest of such person, and in furtherance of the objects of the conspiracy are considered the acts of all the others.

Summing it up in a simple way, if there was, in fact, a partnership in crime, that any act or statement of one partner in furtherance of this partnership in crime during the period of the partnership—that is, up to the time of the arrest—becomes, and may be considered, the act of all the partners, but first you have got to find that they were, in fact, conspirators or partners in the illegal objective.

To find any defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of any co-conspirator is insufficient. Mere association of one defendant with another does not establish the existence of a conspiracy [R. 916–917].

* * * * *

If you find evidence of secrecy, intrigue or deviousness, or lack of it, you may consider that with the other evidence in the case. Mere association of one defendant with another does not establish the existence of a conspiracy. But, as I have pointed out, the fact of agreement or conspiracy is frequently a matter which may be inferred from facts and circumstances in evidence [R. 919].

* * * * *

* * * [S]o far as Whitley is concerned, you have the signed statement which he gave to two Treasury agents which you can consider as

against him but not as against any of the other defendants [R. 924].

* * * * *

I have heretofore advised you in connection with the written statement of the defendant Whitley that it may be taken into consideration by you only in determining his guilt. Since the statement was made after the arrest, the statement may be evidence against him, but is not evidence against the other defendants, and therefore, your determination as to the guilt or innocence of the other defendants must be made on the other evidence without taking into account at all the statement signed by the defendant Whitley which was introduced in evidence [R. 928–929].

While attorneys for petitioner and other co-defendants requested some modifications with respect to other instructions, they made no objection to the foregoing instructions (R. 941).

Petitioner alone filed an appeal. The Court of Appeals affirmed the judgment of the District Court. Judge Learned Hand, reviewing the evidence connecting petitioner with the conspiracy, stated (Pet. App. 15):

* * * [T]he jurors could hardly have failed to find that [petitioner] was in the enterprise. The whole business was illegal and carried on surreptitiously; and the possibility that unless he were a party to the venture, Pierro and Margiasso would have associated him to the extent we have mentioned is too remote for serious discussion.

With respect to the admission of Whitley's confession, Judge Hand pointed out that "Judge Dawson admitted this confession against Whitley only with the most particular and scrupulous admonitions that the jury should disabuse their minds of it in deciding the guilt of the other four", and referred to the well settled doctrine holding such an admission competent with such proper instructions (Pet. App. 15–17). He also held it a proper exercise of discretion by the trial judge to refrain from attempting to delete names from the confession, since this would have been futile in the face of the extensive body of testimony otherwise connecting petitioner with the matters referred to in the confession (Pet. App. 17–18).

Judge Medina, concurring, was of the opinion that there was no basis for any supposition that the jury had disregarded the "emphatic and clear" instructions (Pet. App. 18–19).

Judge Frank, dissenting, relied primarily upon his view that the inference of petitioner's participation, upon the basis of evidence other than the confession, would not be "irrational," but would also not be "irresistible" or "overwhelming," and that cautionary admonitions have no effect on the jury (Pet. App. 19, *et seq.*).

SUMMARY OF ARGUMENT

I

Petitioner's contention that the evidence fails to show that he was a participant in the conspiracy, rather than a mere associate of the conspirators, is answered by the direct and uncontradicted proof show-

ing his connection with a group operation in illicit alcohol, of large scope and necessary secrecy, in which petitioner's actions would have been highly improbable without actual participation in the conspiracy.

When the federal agents after a long period of surveillance finally closed the trap, 565 gallons of unstamped alcohol were found stored at the garage at the Harding Park address, and another 95 gallons had just been delivered from the garage to co-conspirator King's car via the switchpoint at the gasoline station on Bruckner Boulevard. Petitioner's activities in both the garage and gas station phases of the operation were eloquent as well as extensive. When the garage was purchased—nominally in the name of a woman who was never seen there before or after the purchase—it was first carefully inspected by two persons, of whom petitioner wa one. The other person, Pierro, conducted the conversations negotiating for the purchase, but petitioner and another of the conspirators, Margiasso, were generally present, petitioner under the alias of "Bobbie London".

After the purchase, the windows of the garage were boarded up. Petitioner was seen at the premises, and was seen driving back and forth between his residence and the garage. He was seen driving his car to the garage, opening the door, and backing his car up to the open door. At times he was in a Diamond T truck, operated under false registry, which was observed alternately parked alongside the garage or across from petitioner's residence. The truck was observed upon occasion to be missing in the hours

around 2 a. m., but back alongside the garage in the morning.

Petitioner was also seen working over a Dodge truck, later repainted and also under false registry. It was from this truck that he and Margiasso were observed transferring to the Diamond T truck folded cartons suitable for five-gallon cans.

At the Bruckner Boulevard gas station, petitioner's repeated appearances were of a frequency and timing beyond any likely explanation as mere coincidence or conviviality. On December 18, 1951, petitioner was at the gas station late in the afternoon and then early in the evening, meeting Margiasso in the office there just before two men in a Pontiac drove up, turned over their car to Margiasso, and later received it back from him heavily loaded.

On December 28, 1951, the pattern of turning over the alcohol to co-conspirators was again demonstrated, but this time without escape from the federal agents. As before, petitioner and Margiasso met in the office of the gas station. Petitioner left and a Plymouth coupe appeared, driven by co-conspirator King. Margiasso again drove off to the garage. Petitioner reappeared at the gas station and stayed with King until Margiasso returned with the Plymouth. King left the gas station, was followed by the federal agents, and was found to have 95 gallons of illicit alcohol in the car. Later that same night, the pattern was repeated, with petitioner and Margiasso, unaware of the arrest of King, reappearing at the gas station. The Pontiac unsuccessfully followed on December 18 reappeared at the gas station. Again Margiasso took

the car and drove to the garage, but he was arrested near there, and the owner of the Pontiac, later arrested at the gas station, was found to be waiting with $1,000 in a paper bag. Just after the arrest in the gas station, petitioner reappeared there, obviously for the purpose of being present at the consummation of this transaction as in previous transactions. Upon approach by the federal agents, petitioner unsuccessfully tried to escape.

In the light of the danger and secrecy of the whole operation, petitioner's precise appearances upon the occasions of transfer of liquor and his other numerous contacts at the garage and with the trucks cannot be explained away as the mere coincidental presence of a friend. His attempt to escape was also not the act of an innocent man or mere bystander.

The jury was carefully instructed that to find petitioner guilty he must have "actively participated" and that "mere knowledge of an illegal act" or "mere association" would not suffice. Its finding of guilt was firmly grounded in the uncontradicted evidence. "It is not necessary that the participation of the accused should be shown by direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference." *United States* v. *Manton*, 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664; *Glasser* v. *United States*, 315 U. S. 60, 80.

II

Petitioner contends that the admission of Whitley's confession against Whitley alone was error with re-

spect to petitioner, despite the fact that the confession was separately presented under careful and repeated instructions to the jury that it was not to be considered with respect to the guilt of anyone other than Whitley. Basically, petitioner's contention is that a jury cannot be trusted to obey instructions—an assertion rejected by this Court as recently as *Opper* v. *United States*, 348 U. S. 84, 95.

The evidence against petitioner was at no time intermingled with Whitley's confession. The direct evidence was first introduced, and the confession was then put in, completely separate and beyond possibility of confusion, under exceptionally clear admonitions and instructions by the court that the confession was to be considered against Whitley alone.

Petitioner's argument is thus an outright demand for a change in the law, to prohibit—arbitrarily and indiscriminately—all use of evidence against any defendant in a joint conspiracy trial unless admissible against all defendants. Such a demand is based upon so low an estimate of a jury's capacity that it challenges the validity of the entire jury system rather than merely its adequacy in handling the comparatively easy task involved in this case.

But "[o]ur theory of trial relies upon the ability of a jury to follow instructions" (*Opper* v. *United States*, 348 U. S. 84, 95). The instructions here were much less difficult to understand or apply than instructions commonly required in criminal trials, and there is no indication that the instructions were in any respect disobeyed. Petitioner's broad speculation as to the psychology of juries is of a type repeatedly

and properly rejected by this Court and the Courts of Appeals.

ARGUMENT

I

The jury's conclusion that petitioner was a participant in the conspiracy is sustained by ample evidence

Petitioner's contention that the evidence does not support the verdict is supported only by conjecture as to possible innocent explanations of individual bits of evidence, without giving any effect to the legitimate inferences to be drawn from the evidence as a whole. In its totality, the evidence (discussed in detail below) revealed petitioner as in active and continuous contact with a garage in which a large amount of alcohol was concealed, and with a truck shown to be connected with the garage, making repeated and precisely timed appearances at the gas station where cars loaded with alcohol were turned over to individuals. Not only is there a legitimate inference that, in the extensive and secret alcohol operation involved, there would be no place for continuous and active observation by a mere by-stander, but, even more, petitioner's appearances at the time of sales were irreconcilable with non-participation. Petitioner presented no evidence to rebut these reasonable inferences. He offered no witnesses (who should easily have been available) to show any other purpose for his repeated appearances at the garage and the gas station or his need for the truck which alternately appeared at the garage and at petitioner's residence. The jury was fully justified in drawing the conclusion of guilt from the uncontradicted evidence of petitioner's conduct.

It has long been established that the showing of participation in a conspiracy is not restricted to direct testimony. The reasonable inferences from observed conduct are sufficient and, indeed, often the only possible proof of secret activities. *Glasser* v. *United States,* 315 U. S. 60, 80; *Direct Sales Co.* v. *United States,* 319 U. S. 703, 714; *United States* v. *Manton,* 107 F. 2d 834, 839 (C. A. 2), certiorari denied, 309 U. S. 664. As this Court said in *Blumenthal* v. *United States,* 332 U. S. 539, 557:

> * * * Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it * * *.

The uncontradicted factual testimony commences here with the acquisition of the garage adjoining a cottage on Harding Park in the Bronx, New York, in December 1949. The garage was carefully inspected by petitioner and his co-defendant Pierro before the purchase (*supra,* p. 6), and petitioner and codefendant Margiasso were present at conferences with the owner.

After the seller moved out, the windows of the garage were boarded up (*supra,* p. 7). At the trial in an ineffectual effort to make this seem innocent, petitioner cross-examined as to whether storms and rain did not make this change necessary. The suggestion was negated by the replies of the witnesses.

Nor was any persuasiveness added by petitioner's unsuccessful effort to show a need for the covering of the windows due to repairs, or the play of neighborhood children (R. 47, 49–50, 99, 100–101, 103, 117, 568).

The covering up of the windows and the padlocking of the door were accordingly circumstances from which the jury could properly infer a desire to keep the activities within the garage secret. The jury could also properly conclude that no one but a participant would be permitted the contacts with such secret premises which petitioner thereafter continued to have. Petitioner, at the trial, called as his only witness a woman who lived across the street from the garage premises, in an attempt to suggest that his presence there was merely social. He asked the witness whether a woman had been with petitioner at the time. Upon the answer "No, no," petitioner promptly excused the witness (R. 577). This ineffectual attempt to explain his presence highlights the fact that his repeated appearances were not and could not have been innocent.

In the spring of 1950, petitioner was observed with Pierro at a parking lot inspecting the Diamond T truck which was later acquired and registered under a false name. Shortly thereafter, petitioner was observed driving it to a filling station and parking it near his home. Thereafter, it was observed alternately parked alongside the garage or on a lot across from petitioner's residence. During 1950 and 1951, the truck was seen parked for weeks at a time alongside the garage, never in use during the day but on

a number of occasions in 1951 missing from about 2 a. m. until morning (*supra,* p. 8). The inference that the truck was used in the liquor business conducted in the garage is inescapable; petitioner's activity with respect to its purchase, and its frequent appearance near his home, is another element of evidence which, together with his presence at the garage, helps build the conclusion of his active involvement in that illegal liquor business.

With closer surveillance by federal agents late in 1951, more of petitioner's activity emerged. He was seen driving his car to the garage, opening the door of the garage, and backing his car up to the door (*supra,* p. 8). He was seen busied about a green Dodge truck, originally without license plates and later under false registry and repainted. He was seen with Margiasso, in a lot across from petitioner's residence, taking folded cartons suitable for 5-gallon cans from the Dodge truck and transferring them to the Diamond T truck, then driving to the garage in the truck (*supra,* p. 8). These are acts of a participant, not a mere observer of an illegal business.

Also of great significance is the proof of petitioner's precisely timed appearances at the gas station when cars were driven away and returned heavily-loaded—*i. e.,* his appearances at the transfers of liquor by the ring. Petitioner was at the gas station twice on the evening of December 18, 1951, the second time with Margiasso in the office shortly before a Pontiac car was driven up, taken away by Margiasso and returned in half an hour heavily loaded (*supra,* p.

9). On the evening of December 28, 1951, he was present when two transfers of liquor were made. Before the first transfer, petitioner was in the gas station office with Margiasso, leaving briefly before King drove up. Margiasso drove away in King's car and petitioner reappeared and stayed with King, first in Margiasso's car, then in the gas station office, then in petitioner's own car, until Margiasso returned King's car with a load of alcohol (*supra*, pp. 10–11).[5] King was trailed by federal agents and the alcohol was seized (*supra*, p. 11).

Petitioner and Margiasso, clearly unaware that King had been trailed and caught by the federal agents, reappeared again at the gas station at 10 p. m. on the same evening. Again petitioner left just before the alcohol buyers arrived, Margiasso again took the buyers' car—the Pontiac car that had eluded the federal agents in traffic on December 18—and again petitioner reappeared at about the time for transfer of the car by Margiasso to the buyers. But this time, Margiasso had already been arrested at the garage, and the buyer had been arrested at the gas station while waiting with $1,000 in a paper bag. When petitioner drove up to the gas station and then

[5] Petitioner's attempt (Pet. Br. 16) to argue away the unavoidable implications of his extended stay by referring to the fact that his car was placed on the gas station's greasing pit during a part of the stay falls far short of an adequate explanation. It does not appear that any work was done on the car, and if there was a brief time of service on the car, this fails to explain petitioner's remaining stay close to King, or his repeated other appearances at the gas station, one of them later on the same evening.

tried to escape from the federal agents, he completed both a routine of guilty conduct and a final act revealing his guilt.

The jury was plainly entitled to infer that it was an integral part of the operation that petitioner be present when a transfer of alcohol was made at the gas station, whether as collector, supervisor, or both. The inference is clear that he was a participant in the operation, for no mere hanger-on or friend would be allowed such repeated observation of, and attendance at, the crucial procedure. As stated by Judge Hand (Pet. App. 15):

> * * * [T]he jurors could hardly have failed to find that [petitioner] was in the enterprise. The whole business was illegal and carried on surreptitiously; and the possibility that unless he were a party to the venture, Pierro and Margiasso would have associated him to the extent we have mentioned is too remote for serious discussion.

Petitioner's attempt to escape is also of great significance in the context of the remaining evidence. It has long been recognized that an attempt to flee affords a legitimate basis for an inference of guilt. *Allen* v. *United States*, 164 U. S. 492, 498–499; *Bird* v. *United States*, 187 U. S. 118, 131–132; *United States* v. *Heitner*, 149 F. 2d 105, 107 (C. A. 2), certiorari denied *sub nom. Cryne* v. *United States*, 326 U. S. 727; Wigmore, *Evidence* (3d ed. 1940) § 276. The dismissal of this element in the dissenting opinion below (Pet. App. 19, fn. 1), with a footnote quoting only a summary of what occurred, is not an adequate

treatment of the incident itself as set forth in the record (R. 181, 413–416, 437–441). When petitioner tried to back his car away from the gas station into the main boulevard, the jury could certainly have found that he was heading for escape and complete disappearance. As he backed the car, the federal agent was trying to talk to him and was forced to jog alongside in his effort to stay with petitioner. The evidence of attempted escape was brief only because another federal agent drove his car into the path of petitioner's car and a police car blocked petitioner off on the side. It was this action, and no abatement in the will toward flight, that ended the escape attempt (*supra*, p. 12).

Any one incident in the foregoing summary might be subject to an innocent explanation, although none was offered. The totality is a powerful demonstration of knowing, active participation in the conspiracy.

The trial judge cautioned the jury—over and above the ordinary instruction on reasonable doubt (R. 903–904)—as follows (emphasis added):

> The existence of the conspiracy *and each defendant's connection with it* must be established *by individual proof* based upon reasonable inference to be drawn from *such defendant's own* actions, *his own* conduct, *his own* declarations, and *his own* connection with the actions and conduct of the other alleged co-conspirators.
>
> * * * * *
>
> To find any defendant guilty of conspiracy you must find that he actively participated therein. Mere knowledge of an illegal act on the part of any co-conspirator is insufficient.

> *Mere association* of one defendant with another *does not establish the existence of a conspiracy* [R. 916–917].
>
> * * * * *
>
> If you find evidence of secrecy, intrigue or deviousness, or lack of it, you may consider that with the other evidence in the case. *Mere association* of one defendant with another *does not establish the existence of a conspiracy.* But, as I have pointed out, the fact of agreement or conspiracy is frequently a matter which may be inferred from facts and circumstances in evidence. [R. 919.]

In the face of these clear admonitions, there is no occasion for conjecture that the jury failed to consider the question whether petitioner was a mere bystander or an actual participant. Rather, the frequency and timing of petitioner's activities at the secret storage place of the alcohol and at the switch-point (the gas station) for delivery of the alcohol, capped by petitioner's attempted flight, left the jury with solid grounds for concluding that petitioner was a participant, and, indeed, a leading participant, in the conspiracy.

II

The admission of the Whitley confession against Whitley alone was proper

Petitioner contends that the admission in evidence of Whitley's confession—admitted only against Whitley—was prejudicial to petitioner because statements in the confession showed petitioner's guilt as well as that of Whitley. Petitioner urges that the jury must

have been influenced by these statements (Pet. Br. 22).

The government's position is that in the relatively simple posture of the evidence in the instant trial, with its complete separation of the eye-witness testimony from the Whitley confession, there is no basis for reversal in this claim of confusion by the jury of one body of evidence with the other, especially in light of the clear, repeated and emphatic admonitions and instructions of the trial judge. It is also to be observed that at no point during the trial did petitioner or any of his co-defendants call for a severance or adduce any considerations warranting five separate trials instead of the single trial here conducted. Petitioner objected to admission of certain evidence, but he did not assert that if his objection were overruled he would desire to risk, as an alternative, a separate trial for each defendant. Thus, his argument comes down to the claim that, although the joint trial was clearly not improper and although Whitley's confession was certainly admissible against Whitley, the government was precluded from using the confession at all because the jury could not be trusted, despite the most elaborate instructions, to consider this evidence only in its deliberations concerning Whitley. The argument is answered, we believe, by the pronouncement of this Court in the measurably more difficult case of *Opper* v. *United States*, 348 U. S. 84, 95:

> * * * To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded

> clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. * * *

A. The eye-witness testimony and the Whitley confession were so separated in presentation, and the admission so carefully limited by precautionary instructions, that no confusion of the jury can be assumed

After the testimony of four of the government witnesses, taking two and a half days of trial, was already in evidence, the offer to introduce Whitley's statement was made by the government.[6] At this stage, petitioner merely objected that the statements of Whitley would not be "binding" on petitioner (R. 382). The judge immediately agreed (R. 382), and, with the first question as to what Whitley said, amplified the matter as follows (R. 383):

> The COURT. Any statements made by the defendant Whitley, I take it, at that time would be binding on the defendant Whitley and would not be binding on the other defendants. You agree with that, Mr. O'Hara?

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[6] Petitioner was advised in the government's opening statement that Whitley had admitted, after the final arrests, that he had arranged to obtain alcohol from petitioner (R. 12). Petitioner nevertheless asked for no severance at this opening stage of the trial, despite the requirement that he do so at that time, if at all, under the Federal Rules of Criminal Procedure (Rules 12 (b) (2) and (3), *supra*, p. 4). In an argument after the trial petitioner asserted that he had failed to object to this opening statement because he had assumed that there would be other proof that Whitley bought alcohol from petitioner (R. 868).

Mr. O'HARA [Gov't. Attorney]. Yes, sir.

The COURT. I so instruct the jury: That any statements made by Mr. Whitley may be taken into consideration by them with respect to Mr. Whitley but is not evidence binding upon the other defendants.

Before the confession itself was introduced, there was argument outside the presence of the jury (R. 388–392) in which the claim was made that the confession should be totally excluded because it would prejudice the jury as to co-defendants on whom it was not binding (R. 391). Petitioner's counsel moved to delete the exhibit on the ground that "reference is made to a person known as Bob when there has been reference in the trial that Orlando Delli Paoli has been known as Bobby London" (R. 391). The judge took the matter under advisement and directed the government to proceed with its case (R. 393).

The confession was not admitted until the rest of the government's entire case was introduced. Before the confession was admitted, the judge addressed the jury extensively on its responsibility to consider the confession against Whitley alone (R. 728–736). He reviewed the indictment and repeatedly warned the jury that Whitley's statement was to be considered "solely" as to the guilt of Whitley, that it was "not to be considered as proof in connection with the guilt or innocence of any of the other defendants", that the statement was "not evidence against those defendants because as to them it is nothing more than hearsay evidence," and that the jury must render a verdict as to the defendants other than Whitley without giving

"any" weight to the statement about to be read (*supra*, pp. 12–14). The judge concluded this careful preliminary warning with the following appraisal of the situation (R. 735):

> Since the Government's case is concluded except for this statement or affidavit and the testimony of this witness Greenberg, it will be easier for you to keep in mind the testimony which you have heard up to now concerning the other defendants.

The jury was not left only with this prior warning, adequate though it might have been. There was a long cross-examination of the federal agent, before whom the confession had been signed, and in the course of this examination, in references to statements of Whitley, there was occasion, over and over, to point out that the statements of Whitley could be considered only as evidence against Whitley himself, and not against other defendants such as petitioner (*supra*, p. 15). Instances of the judge's numerous warnings during the course of this cross-examination are particularly illuminating:

> * * * I have advised the jury and I will again advise them at the proper time that any admissions made by the defendant Whitley * * * may be taken into account as against himself; but that any time that he implicates another defendant in his statement, as to those other defendants it is merely hearsay and is not to be taken into consideration in determining the guilt or innocence of the other defendants in the case. I think the jury understands that [R. 823–824].

* * * * *

> * * * I will make it clear to the jury that this statement which has been offered and received in evidence as Defendants' Exhibit F, is received only against the defendant Whitley, and any statements therein or evidence therein relating to the other defendants is not good evidence against the other defendants because it is hearsay evidence as to them [R. 827].
>
> * * * * *
>
> * * * I will again advise the jury that any admissions by the defendant Whitley after the date of his arrest * * * are not to be considered as proof in connection with the guilt or innocence of the other defendants. The reason for that I explained before to you, that the admission by a defendant after his arrest of participation in an alleged crime may be considered as evidence by the jury against him with the other evidence becau[s]e it is, as the law describes it, an admission against interest which a person ordinarily would not make. However, if such a person after his arrest implicates other defendants in such admission it is not evidence against them, because as to those defendants it is nothing more than hearsay evidence. I advise you of that in connection with the testimony of the last witness as to any oral statements made by Whitley or any written statements made by Whitley [R. 864–865].

Finally, in the last charge to the jury before it retired for its deliberations, and after precise warnings that mere finding of the general conspiracy was not enough against any particular defendant—"you must find that he actively participated therein" (*supra*, p. 16)—and that "mere knowledge" and

"mere association" would not be enough (*supra*, p. 16), the judge returned to the admonition specifically covering the Whitley confession (*supra*, p. 17):

> I have heretofore advised you in connection with the written statements of the defendant Whitley that it may be taken into consideration by you only in determining *his* guilt. Since the statement was made after the arrest, the statement may be evidence ***against him, but is not evidence against the other defendants,*** and therefore, your determination as to the guilt or innocence of the other defendants must be made on the other evidence without taking into account at all the statement signed by the defendant Whitley which was introduced in evidence. [Emphasis added.]

Attorneys for petitioner and other defendants—who had requested modifications as to other instructions—had no objection to the instructions on this aspect of the case. The instructions were properly characterized by Judge Hand and Judge Medina, below, as "emphatic and clear" and as "most particular and scrupulous admonitions" (*supra*, p. 18).

The choice before the trial judge was to admit the confession under limiting instructions, or to exclude it entirely from the trial. There was no way in which the confession could have been admitted in evidence against Whitley without its incidental implications against petitioner. As both Judges Hand and Frank agreed in the court below, deletion of petitioner's name would have served no purpose, and might even have increased its effect since the description of the activities by Whitley must inevitably have identified petitioner. Indeed, petitioner made no request for

deletion of his name until after the close of the evidence (R. 867–868), his original motion being to delete the entire exhibit (R. 391). Under these circumstances, the judge's disposition of the matter—by careful, repeated admonitions to the jury and separation of the evidence—was squarely within the authority of numerous decisions, discussed *infra,* pp. 40–42.

The confession was not, as petitioners claimed, "so prejudicial and inflammatory" that it was impossible for the jurors to exclude it from their minds (R. 388, 391). It supplied no sensational addition to the description of the pattern of illicit operation that had already been set forth in the eye-witness testimony. It did explain petitioner's role of collector, but petitioner's active participation in the actual sales was already markedly inferrable from the conduct detailed in the testimony (R. 150–151, 159–161, 179–181, 292–295, 306, 329, 353, 372–373). The additions were of no such intrinsic strength or vividness as would make it impossible for the jury to separate them from the evidence admissible against petitioner. While comparisons with the particular facts in other cases can never be wholly satisfactory, we think it a fair statement that the confession of Whitley in this case threw no more light on the conspiracy here charged than, under their different facts, did the confessions of co-conspirators in *Blumenthal* v. *United States,* 332 U. S. 539, 559–560, or in *Opper* v. *United States,* 348 U. S. 84, discussed below. The suggestion of Judge Frank that the confession somehow took on more significance because it was in writing would

seem to be unfounded. Aside from the fact that in *Opper* v. *United States*, 348 U. S. 84, much of the co-defendant's declaration was in written form, including a record of sworn testimony before a grand jury, the exhibit here was merely read to the jury (R. 738)—it was not given to the jury. The jury was told that exhibits would be sent in on request (R. 933), but there is no record of any such request. The testimony of a living person before the jury could well be of infinitely greater and more lasting effect than the written page re-read in court.

In sum, there was nothing about this confession or the circumstances under which it was admitted which would render it different from any confession by a co-defendant, admitted under limiting instructions. Rather, in this case, more than in many others (*infra*, pp. 40–42), the jury could easily consider the confession separately from the remainder of the evidence. There was here no mass trial with a multiplicity of evidentiary restrictions. There was only this one confession—separately introduced with clear and explicit cautionary instructions before and after the reading of the confession—to be kept apart from the remainder of the evidence. The jury was carefully and emphatically instructed to observe that separation, and there is nothing in the record to indicate that the jury did not obey these instructions when it made a finding of guilt.

Petitioner's argument that the confession must nevertheless have been considered by the jury is merely a reiteration of the argument discussed in Point I, that the evidence admissible against him is insufficient to sup-

port the verdict. But, as we have shown, a jury which did follow the clear and explicit instructions of the trial judge to disregard the confession as to petitioner could validly conclude—as the trial judge and all three appellate judges have agreed—that petitioner was an active participant in the conspiracy. There is thus no reason to believe that it did not follow the instructions as given.

B. In the absence of a showing of actual confusion, the law imposes no prohibition against a joint trial of alleged conspirators, nor does it forbid the use, under proper instructions, of evidence admitted against only one of the defendants

Since, as we have shown, there is nothing in the particular facts of this case to show actual confusion or even a tendency to confuse the confession with the evidence properly admissible against petitioner, the contention that it was error to admit the confession amounts to the broad assumption that a jury can never—regardless of the actual conditions of a particular trial—be held capable of remaining uninfluenced by such restricted evidence.

The proposed rule would not only make an absolute presumption of what this Court termed an "unfounded speculation" in *Opper* v. *United States*, 348 U. S. 84, 95, but would carve an outright exception out of the settled law and the specific provisions of the Federal Rules of Criminal Procedure which authorize joint trials.[7] Despite the frequent and elo-

[7] The Federal Rules of Criminal Procedure continue to provide for joinder of defendants without in any manner excepting conspirators (Rule 8, F. R. Crim. P.), and they provide that if it appears that a joinder is prejudicial the court "may" grant a severance of defendants "or provide whatever other relief justice requires" (Rule 14, F. R. Crim. P., *supra*, p. 4).

quent utterances of judges and writers dealing with the problems and dangers in joint trials, such trials remain a proper and necessary means of counteracting the equally serious problems intrinsic in separate and successive trials of joint defendants. If joint defendants are tried separately there is always the practical danger to the individual defendant that an earlier conviction of a co-defendant may have come to the notice of the potential jurymen of the community, or that a convicted co-defendant may furnish strong evidence against another defendant in the hope of obtaining better future treatment. Moreover, there is additional expense to the defendant in proper surveillance of several trials instead of one, as well as the expense to the government in "unnecessary repetition of substantially the same evidence." *Turner* v. *United States,* 222 F. 2d 926, 932 (C. A. 4), certiorari denied, 350 U. S. 831.

Petitioner's present over-emphasis on the danger of a joint trial has repeatedly been rejected by this Court, and not without consideration of the admitted but lesser difficulty of a joint trial in keeping the jury clear as to evidence that is to be considered only against one defendant. In *Lutwak* v. *United States,* 344 U. S. 604, 619, considering factual and legal issues more complex than the ones here, the Court confronted the type of argument petitioner advances (see 344 U. S. at 623), recognized the "heavy burden" thus placed upon a jury, but sustained the admission of evidence against one party alone if accompanied by proper instructions.

In *Opper* v. *United States,* 348 U. S. 84, this Court once more dealt with a more difficult trial problem than the one here involved, for the co-defendant's confession there was not separated in point of time, as here, from the remainder of the evidence but was intermingled with the general testimony (O. T. 1954, No. 49, R. 207–208, 255–278, 282–285, 289–317, 432–492). Nevertheless, the Court recognized that it was not to be assumed that a jury was incapable of heeding the type of instructions given there and in the instant case. Petitioner's suggestion that the case is distinguishable because of a greater strength in the remaining evidence (Pet. Br. 28) is not borne out by a comparison of the respective records, nor does the suggestion present a pertinent distinction. For if, as petitioner contends, the indirect influence of restricted evidence is to be assumed irrespective of any showing of its actual influence, then the slightest influence, even in an otherwise strong record, could be hypothesized as having tilted the balance.

Again, in *Blumenthal* v. *United States,* 332 U. S. 539, 553, the Court declined to "assume that the jury misunderstood or disobeyed" the trial court's directions to consider confessions admissible only against the persons who made them, in a case where the evidence to show participation in the conspiracy by the non-confessing defendants was circumstantial, the very existence of a conspiracy depending on inferences from proven conduct.[8] In a word, all the de-

[8] Petitioner seeks support in *Krulewitch* v. *United States,* 336 U. S. 440, but that case deals solely with the effort to admit the statement of one *not* a defendant. The holding in *Krule-*

cisions, reflecting the basic premises which underlie the jury system, hold that, without a very clear showing to the contrary, a jury is presumed to be able to follow instructions.[9]

Of similar import are cases holding that the fact that admissions have been made by one defendant which are not evidence against others is not ground for ordering the parties to be tried separately. *Hall* v. *United States,* 168 F. 2d 161, 163 (C. A. D. C.), certiorari denied, 334 U. S. 853; *Dauer* v. *United States,* 189 F. 2d 343, 344 (C. A. 10), certiorari denied, 342 U. S. 898; *Sharp* v. *United States,* 195 F. 2d 997, 999 (C. A. 6). A severance should not be compelled by indirection, by an absolute rule forbidding the employment of part of the evidence applicable against one of the defendants.

Granted that there may be occasions where a trial is so confused as to raise a specific doubt as to whether the evidence could be kept separate, no such situation is here presented. In view of the constant admonitions by the trial judge that this one separate

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witch is merely that the utterance of a co-conspirator is not admissible against others after termination of the conspiracy. The *Krulewitch* holding was fully recognized in the instant case, and no attempt was made to admit Whitley's confession against the co-conspirators.

[9] As examples of the application of the same principles in the courts of appeals, see *Cwach* v. *United States,* 212 F. 2d 520, 526 (C. A. 8); *United States* v. *Simone,* 205 F. 2d 480, 483–484 (C. A. 2); *Metcalf* v. *United States,* 195 F. 2d 213, 217 (C. A. 6); *United States* v. *Leviton,* 193 F. 2d 848, 856 (C. A. 2), certiorari denied, 343 U. S. 946; *United States* v. *Gottfried,* 165 F. 2d 360, 367 (C. A. 2), certiorari denied, 333 U. S. 860; *Nash* v. *United States,* 54 F. 2d 1006, 1007 (C. A. 2), certiorari denied, 285 U. S. 556; *Waldeck* v. *United States,* 2 F. 2d 243, 245 (C. A. 7).

item of evidence was not to be considered against anyone but the confessor, error can be found in this case only if the Court reverses its previous consistent rulings that it must be presumed that a jury can and does follow instructions.

Our whole jury system is based upon the conviction that the jury will heed the judge's charge with reasonable intelligence and genuine honesty. Petitioner's general challenge to any jury's capacity ever to keep evidence separate in its deliberations is by its nature inseparable from comparable claims that juries must similarly be incapable of performing duties equally difficult, if not more so. If it must be assumed that a jury cannot be trusted to remain uninfluenced by excluded evidence, there can be little trust in the competence of a jury to heed the common instructions to exclude all influence of a defendant's failure to testify or of a defendant's invoking of the privilege against self-incrimination. In this view, error inheres in many trials, and no admonition by a trial judge could correct it; at the same time, no possible corrective substitute for such instructions is available. A non-specific, general cynicism concerning jury capacity and integrity cannot be the basis of a special rule of law in the instant type of case without impugning the capacity and integrity of the jury over virtually the entire range of its functions, nor can such a special rule be adopted without suggesting many comparable rules which would severely and unfairly hobble jury trials.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be affirmed.

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